

Senate Judiciary Committee
Juvenile Competency Legislation (SB 246, 247)

Testimony Submitted by Michelle Weemhoff
May 22, 2012

The Supreme Court case, *Dusky v. United States*, 362 U.S. 402 (1960), affirmed a defendant's right to receive a competency evaluation before proceeding to trial, noting that an individual accused of a crime is not competent to stand trial if they lack "sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding - and... a rational as well as factual understanding of proceedings against him."

According to the Mental Health Code, adults and youth being tried as adults in Michigan's criminal justice system may receive a competency evaluation from experts at the Michigan Department of Community Health's Center for Forensic Psychiatry or the Hawthorn Center, an inpatient psychiatric facility for children and adolescents. Youth in the juvenile justice system, however, do not have access to the Forensic Center or Hawthorn Center.

Current Michigan Law does not address how courts are to determine whether a youth in the juvenile justice system is competent. As a result, deeply troubled youth are lingering in detention, with staff who are unequipped to deal with very serious cases; courts are left with no guidance and families are left with no options.

According to the Michigan appellate decision *In re Carey* (2000), "Juveniles have a due process right not to be subjected to the adjudicative phase of juvenile proceedings while incompetent." *Carey* held that, in the absence of statutory provision governing juvenile competency, a juvenile's due process right could be protected using the Mental Health Code provision for adult competency determinations (*MCL 330.2020, et seq.*).

The *Carey* decision specifically stated: "Accordingly, we further hold that, in juvenile competency hearings, competency evaluations should be made in light of *juvenile*, rather than adult norms." Conventional standards for competency have typically focused only on the effects of mental illness or developmental disability on an individual's ability to understand and participate in his/ her defense; yet emerging research and expert opinion indicate a necessity to also consider a child's lesser capacities owing to biological, emotional, and psychological immaturity in regards to competency in court.¹

In May 2006, the Thomas Cooley Law School and DHS Juvenile Justice Workgroup sponsored a Symposium on Culpability and Competency of Juveniles, presenting material which examined how several other states have addressed these issues. At that time, the Michigan Council on

¹ MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. Issue Brief 1: Adolescent Legal Competence in Court.

Crime and Delinquency convened a diverse workgroup of stakeholders - including judges, prosecutors, criminal defense attorneys, mental health professionals, child advocates, and professional associations – to develop recommendations for addressing juvenile competency.

To assist with these recommendations, the workgroup reached out to Dr. Tom Grisso of the University of Massachusetts Medical School, Law and Psychiatry Program. Dr. Grisso is the national leading expert on juvenile competency and advisor to the MacArthur Foundation's Research Network on Adolescent Development and Juvenile Justice. Through a request from Representative Schuitmaker's office, Dr. Grisso provided a memo that outlines what the research tells us and how other states have used this research to address similar legislation. This year, Dr. Grisso and his colleague, Dr. Larson, completed a guidebook, *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers*. Michigan's legislation closely follows the recommendations in this Guidebook. Specifically, the legislation addresses:

- *Definition for Juvenile Competency:* Juvenile competency is defined along the Dusky standard, with consideration for *in re Carey*, which acknowledges that juvenile competency should be made in light of age-appropriate norms.
- *Age of Presumed Incompetence:* A juvenile 10 years of age or older is presumed competent to proceed unless the issue of competency is raised by a party. A juvenile less than 10 years of age is presumed incompetent to proceed.
- *Qualifications for Examiners:* A qualified forensic mental health examiner is a psychiatrist or psychologist who possesses experience or training in ALL of the following: 1) forensic evaluation procedures for juveniles; 2) evaluation or treatment of children and adolescents with emotional disturbance, mental illness, or developmental disabilities; 3) clinical understanding of child and adolescent development; 4) familiarity with competency standards in this state.
 - *Forensic Evaluation Training* – The Michigan Department of Community Health shall review and endorse a training program, which will permit licensed social workers, licensed counselors and limited licensed psychologists, who have the requisite experience, to also become qualified forensic mental health examiners. I have submitted, for your review, a draft training outline, developed by Drs. Grisso and Larson. *Note:* The courts will always have the discretion to determine who qualifies as an expert witness.²
- *Competency Report* - The evaluation shall be based on a juvenile adjudicative competence interview (JACI) or another interview method approved by the court.

² The Michigan appellate decision *In re Blackshear* (262 Mich App 101, 2004) held that the Probate Court (now the Family Division of Circuit Court) has no authority under the Mental Health Code to order a Community Mental Health (CMH) Agency to arrange and pay for an juvenile competency evaluation.

- *Restoration:* If found incompetent, the court may attempt to stabilize or educate a child about the court process so that his case could be resumed. *Note:* Restoration should not be confused with treatment.

While the bills are intended to establish standards for juvenile competency, it must be noted that juvenile justice is often an ad hoc mental health system for kids who have fallen through the cracks. I regularly hear stories from parents who were instructed by a mental health provider to file charges against their own children in order to access mental health services only available to adjudicated youth. Similarly, jurists have been known to express a moral obligation to adjudicate in order to provide services, even in cases in which the psychiatrist, defense attorney, and prosecutor recognize the child as incompetent.

Therefore, this legislation tries to address the question, "What do we do with a child who is incompetent but needs services?" The Constitutional answer is quite simple – we cannot prosecute a child who is incompetent. These bills would allow, in a limited way, an avenue for youth with serious emotional disturbances to be served by the community mental health system.

Please remember that competency issues will continue to be raised on a daily basis, regardless of whether standards are sufficiently in place to address this Constitutional right. It is imperative that we enact this legislation as soon as possible so that incompetent children are not left to linger in detention or unwittingly face adjudication.

Respectfully submitted,



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